



DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2009-0271]

Identification of Interstate Motor Vehicles: New York City, Cook County, and New Jersey Tax Identification Requirements; Petition for Reconsideration.

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice; Grant of petition for reconsideration.

SUMMARY: The FMCSA grants a petition for reconsideration submitted by the New York City Department of Finance (DOF) requesting reconsideration of the Agency's previous determination that the credential display requirement of New York City's Commercial Motor Vehicle Tax (CMV Tax) is preempted. Federal law prohibits States and their political subdivisions from requiring motor carriers to display in or on commercial motor vehicles (CMVs) any form of identification other than forms required by the Secretary of Transportation, with certain exceptions. FMCSA has determined that the CMV Tax qualifies for one of the statutory exceptions.

DATES: This decision is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Genevieve D. Sapir, Office of the Chief Counsel, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue, SE, Washington, DC 20590, (202) 366-7056; e-mail Genevieve.Sapir@dot.gov.

SUPPLEMENTARY INFORMATION

Background

On February 25, 2008, the American Trucking Associations (ATA) petitioned FMCSA to preempt §11-809 of New York City's Administrative Code, which requires CMVs used principally in New York City or in connection with a business carried on within New York City to display a stamp evidencing payment of the city's CMV Tax. ATA alleged that New York City's credential display requirement was preempted under 49 U.S.C. 14506(a), which prohibits States from requiring motor carriers to display in or on CMVs any form of identification other than forms required by the Secretary of Transportation. Section 14506(b), however, establishes several exceptions to this prohibition [all statutory references are to title 49, United States Code]:

(b) Exception.—Notwithstanding subsection (a), a State may continue to require display of credentials that are required—

- (1) under the International Registration Plan under section 31704;
- (2) under the International Fuel Tax Agreement under section 31705 or under an applicable State law if, on October 1, 2006, the State has a form of highway use taxation not subject to collection through the International Fuel Tax Agreement;
- (3) under a State law regarding motor vehicle license plates or other displays that the Secretary determines are appropriate;
- (4) in connection with Federal requirements for hazardous materials transportation under section 5103; or
- (5) in connection with the Federal vehicle inspection standards under section 31136.

In response to this and other petitions ATA submitted seeking preemption of credential display requirements in New Jersey and Cook County, Illinois, FMCSA published a notice in the Federal Register seeking comment on whether the credential display requirements of New York City, the State of New Jersey, and Cook County, Illinois should be preempted (74 FR 53578, Oct. 19, 2009). FMCSA specifically requested comment from the three jurisdictions, but neither New Jersey nor New York City responded with comments. After the close of the comment period, Cook County sent a letter conceding that its ordinance was preempted under § 14506.

On October 20, 2010, FMCSA issued an order preempting all three credential requirements (75 FR 64779). FMCSA's preemption analysis focused solely on whether the

exception in § 14506(b)(3) applied. However, in reaching this determination, FMCSA concluded that all of the exceptions at § 14506(b) could apply to political subdivisions of States, including municipalities, if they otherwise meet the statutory criteria (75 FR at 64780-81).

On January 3, 2011, New York City's Department of Finance (DOF) submitted a petition requesting reconsideration of FMCSA's preemption determination. DOF's petition contended that New York City's credential display requirement was based on a form of highway use taxation excepted from preemption under § 14506(b)(2). For the reasons set forth below, FMCSA grants the DOF's petition for reconsideration.

Applicable Law

New York City's CMV Tax has been in effect since 1960. *See* Administrative Code of the City of New York, Title 11, Chapter 8. Subject to several exemptions, the tax applies to both "commercial motor vehicle[s]" and "motor vehicle[s] for the transportation of passengers" that operate on a public highway or public street and are "propelled by any power other than muscular power." §§ 11-801(2)-(4); 11-803. The tax applies to a "commercial motor vehicle" that is "used principally in the city or used principally in connection with a business carried on within the city." § 11-801(3). According to the DOF website, the term "principally used in the city" means that 50% or more of a CMV's mileage during a year is within New York City limits. See http://www.nyc.gov/html/dof/html/business/business_tax_cmvt.shtml. The tax also applies to a "motor vehicle for transportation of passengers" that is "used regularly, even though not principally, in the city." § 11-801(4). The tax rate varies based on the class of the vehicle; for example, the annual tax on a truck is based on maximum gross weight, in accordance with the following classes: 10,000 pounds or less, \$40; 10,001 – 12,500 pounds, \$200; 12,501 – 15,000 pounds, \$275; and 15,000 pounds or over, \$300, but the annual tax on passenger vehicles is a flat

rate of \$400. § 11-802.a.1.(C). Subject to certain exceptions, the tax is paid to the Commissioner of Finance on an annual basis. § 11-808. However, the tax on trucks registered in New York with a maximum gross weight not exceeding 10,000 pounds and certain passenger vehicles is collected by the Commissioner of Motor Vehicles when the vehicle registration is renewed. § 11-809.1(a). The Commissioner of Finance is authorized to require that a tax decal or other indicia of payment be affixed to a vehicle. § 11-809(a); New York City Rules, Tit. 19, § 6-09.

Section 14506(a) prohibits the States or their political subdivisions from requiring a motor carrier to display either in or on a CMV any form of identification other than a form required by the Secretary of Transportation. However, § 14506(b)(2) provides that:

Notwithstanding [§14506(a)], a State may continue to require display of credentials that are required – (2) under the International Fuel Tax Agreement ... or under an applicable State law if, on October 1, 2006, the State has a form of highway use taxation not subject to collection through the International Fuel Tax Agreement;

(emphasis added).

FMCSA Decision

To qualify for the statutory exception at 49 U.S.C. § 14506(b)(2), the credentials (in this case a decal) required by New York City's CMV tax must be part of a highway use tax that was in effect prior to October 1, 2006. Because the tax has been in effect since 1960, the only question before the Agency is whether it is a highway use tax within the meaning of the statutory exception.

In enacting § 14506(b)(2), Congress did not define a highway use tax. Nor is there any other statutory or regulatory definition of highway use tax applicable to this statutory provision. In the absence of controlling authority, the Agency looks to common usage of the

term. In the broadest sense, a highway use tax could mean any type of tax to support highways or any kind of tax on highway business, vehicles, or commerce, or any combination of these. E.M. Cope, Trends in Highway Taxation in the United States, 49 American Highways 8, 9 (Oct. 1970). Perhaps a better focused definition is any “lev[y] that appl[ies] to motor vehicles because of their highway use.” Id.

In the absence of statutory or regulatory guidance, the Agency examines the plain language of New York City’s CMV Tax. By definition, the tax is levied for use of a CMV on the public highways or streets of the city. See § 11-801 (definitions of “commercial motor vehicle” and “use”). Section 11-802(b) offers alternative interpretations of the tax, both of which characterize it as one based on use of highways:

To the extent that the tax as imposed by subdivision a of this section may be invalid solely because it is based on the use in the city of the motor vehicles, the tax shall also be deemed to be based on the privilege of using the public highways or streets of the city by such motor vehicle.

Accordingly, on its face, the CMV Tax is for use of the public highways.

Proceeds from highway use taxes are often dedicated, at least in part, to a special fund for highway infrastructure; however the DOF’s petition does not state how revenue from the CMV Tax is used. Nonetheless, a highway use tax may be levied without demonstrating that the revenues are earmarked for highway infrastructure. See, e.g., Mid-States Freight Lines, Inc. v. Bates, 200 Misc. 885, 890 (N.Y. Sup. Ct.), aff’d, 279 A.D. 451 (3d Dep’t.), aff’d, 304 N.Y. 700 (1952). Stated otherwise, a highway use tax need not necessarily be dedicated to highway purposes. As a result, the DOF’s failure to demonstrate a connection between the CMV Tax and highway funding is not dispositive.

FMCSA concludes, therefore, that New York City's CMV Tax is a highway use tax within the meaning of 49 U.S.C. § 14506(b)(2).

In consideration of the above, FMCSA grants the DOF's petition for reconsideration and reverses its decision preempting New York City's credential display requirement. Today's decision is limited to the new arguments the DOF raised in its petition for reconsideration claiming exception from preemption under § 14506(b)(2). Under this analysis, New York City's credential display requirement in § 11-809 is not preempted and New York City may resume enforcement.

This decision does not affect the Agency's previous determination preempting the credential display requirements in New Jersey and Cook County, Illinois.

Issued on: February 29, 2012

Anne S. Ferro

Administrator

Federal Motor Carrier Safety Administration

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